STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 15, 2015

In re BABCOCK/STREICH, Minors.

Nos. 322115; 322116
Van Buren Circuit Court
Family Division
LC No. 13-017621-NA

Before: RIORDAN, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

In docket no. 322115 respondent-mother appeals by right the trial court's order terminating her parental rights to the minor children MJB and LDS. In docket no. 322116, respondent-father appeals by right the trial court's order terminating his parental rights to the minor children MJB and MLBS. Respondents' parental rights to their respective children were terminated pursuant to MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm if child is returned to parent). We affirm.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "We review the trial court's determination for clear error." *Id*.

On appeal, respondents both make several arguments regarding the evidence that the trial court relied upon when deciding whether to terminate their parental rights. First, they argue that the trial court based its finding that there were statutory grounds for termination on hearsay evidence, specifically, a caseworker's March 2014 report for a permanency planning hearing. But respondents do not challenge the trial court's admitting the report into evidence. Rather, they challenge the weight that the trial court placed on the information contained in the report. It is for the trier of fact, not this Court on appeal, "to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, contrary to respondents' arguments, the record supports that the trial court did not rely solely on the report when determining whether there were statutory grounds to terminate their parental rights. Moreover, the unchallenged evidence overwhelmingly supports the trial court's determination.

Respondents also argue that the trial court improperly relied on their admissions at the adjudicatory stage of the proceeding when deciding whether to terminate their parental rights.

But because a plea entered in a child protective proceeding may later be used as evidence to terminate parental rights, MCR 3.971(B)(4), it was proper for the trial court to consider respondents' admissions at the adjudicatory stage of the proceeding when deciding whether to terminate their parental rights. Further, contrary to respondents' arguments on appeal, the trial court did not rely on circumstances that were present before the children entered care when deciding whether to terminate their parental rights.

Next, in docket no. 322115, respondent-mother specifically argues that the trial court erroneously found statutory grounds to terminate her parental rights. Although not directly argued by respondent-father on appeal in docket no. 322116, we also consider whether the trial court correctly found statutory grounds to terminate his parental rights. We conclude that the trial court properly found by clear and convincing evidence that termination was proper because "[t]here is a reasonable likelihood, based on the conduct or capacity of the child[ren]'s parent, that the child[ren] will be harmed if [they are] returned to the home of the parent." MCL 712A.19b(3)(j). The harm to the children contemplated under § (3)(j) includes emotional harm as well as physical harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Respondents had a history of abusing substances, and they were abusing them when the March 2013 petition for child protective proceedings was filed. During the proceeding, respondents were both in jail on at least three occasions, and respondent-father was arrested on the day of the termination hearing for a bond violation. During relevant periods of time, respondent-mother lived in two homes where methamphetamines were manufactured, and respondent-father lived in one of those homes with her. Respondent-mother tested positive for methamphetamines at times during the proceeding, and she had only demonstrated sobriety for four months at the time of the termination hearing. Notably, she was pregnant at the time of termination, and there were concerns that she would relapse in the future. Although respondent-father continued to test positive for methamphetamines and other substances and was convicted of possession of methamphetamines in the months leading up to termination, respondent-mother continued to live with him. Although she argues on appeal that respondent-father's behavior during the proceeding should not have been considered when deciding whether her parental rights should be terminated, the record establishes that respondents shared a home and bills and that respondent-mother was pregnant with respondent-father's child at the time of termination. Respondent-mother did not express an intent to end her relationship with respondent-father until the day of the termination hearing, and she admitted that she was having difficulty "letting go" and continued to "have faith" in respondent-father. There is no evidence whatsoever in the record to indicate that they would remain apart in the future.

Further, during the proceeding, both LDS and MLBS reported that respondents had abused them. During the 13-month proceeding, respondent-father had not visited MJB or MLBS at all, and respondent-mother failed to seek visitation with MJB and LDS for at least eight months. At the time of the May 2014 termination, MJB was confused and did not view respondent-mother as a parent. LDS had not seen respondent-mother since April 2013, and it was believed it would be detrimental for him to have visitations with her. Respondent-mother was unable to financially support her children at the time of termination because she lacked full time, legal employment. Under these facts, we cannot find clear error in the trial court's determination regarding MCL 712A.19b(3)(j) because we do not have "a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105

(2009). Moreover, because the trial court properly found at least one ground for termination existed, we need not consider the additional ground upon which the trial court based its decision to terminate respondents' parental rights. *Id.* at 461.

Both respondents also argue that their trial counsel was deficient. In termination cases, this Court applies "the principles of ineffective assistance of counsel as they have developed in the context of criminal law." *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). Because respondents' claims of ineffective assistance of counsel are unpreserved, this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, respondents must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for the deficient performance the outcome of the proceeding would have been different. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002), overruled in part on other grounds by *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014).

In docket no. 322115, respondent-mother argues that her trial counsel was ineffective because he failed to attend the March 20, 2014 permanency planning hearing and was therefore unable to cross examine the caseworker about the report that was drafted regarding respondent-mother's progress leading up to the permanency planning hearing. In fact, respondent-mother's trial counsel was not present at the permanency planning hearing, and the attorney that trial counsel secured to stand in for him was also not present when the hearing began. However, because the caseworker was not present at the permanency planning hearing, respondent-mother's trial counsel would not have been able to cross examine the caseworker even if he had been present. Further, there is no evidence on the record to support that the day of the termination hearing was the first time that respondent-mother's trial counsel was able to review the information contained in the report and consult with respondent-mother about it. Her argument that she was unable to rebut the information contained in the March 2014 report as a result of trial counsel's failure to attend the permanency planning hearing is therefore unsupported. Respondent-mother is not entitled to relief because she has failed to establish that she was prejudiced by counsel's alleged error. *In re CR*, 250 Mich App at 198.

Respondent-mother next argues that her trial counsel was ineffective because he only called her as a witness at the termination hearing. An attorney's decision regarding witnesses is a matter of trial strategy, and a party claiming ineffective assistance must overcome the presumption that counsel employed effective trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). But the failure to call a witness may constitute ineffective assistance of counsel where it deprives a party of a substantial defense. *Id.* In this case, there is no evidence on the record to support that there were favorable witnesses of whom respondent-mother's trial counsel was aware, and respondent-mother fails to explain on appeal who could have been called to testify at the termination hearing and what their testimony would have been. As a result, respondent-mother has failed to establish the factual predicate for her claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Moreover, given the overwhelming evidence supporting termination of respondent-mother's parental rights to MJB and LDS, we fail to see how calling additional witnesses at the termination hearing would have changed the outcome below. *In re CR*, 250 Mich App at 198.

In docket no. 322116, respondent-father argues that he was deprived of effective assistance of counsel because no evidence was offered or witnesses called at the termination hearing to support that his parental rights should not be terminated. Respondent-father is not entitled to relief because he fails to explain or rationalize how his trial counsel's failure to call him as a witness at the termination hearing did not amount to trial strategy. "This Court will not substitute its judgment for that of a respondent's counsel in matters of trial strategy." *In re Trowbridge*, 155 Mich App at 787. Further, there is no evidence on the record to support that there was favorable evidence or witnesses of whom respondent-father's trial counsel was aware. Respondent-father also fails to explain on appeal what evidence could have been presented on his behalf at the termination hearing. Thus, he has failed to establish the factual predicate for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6. Moreover, given the overwhelming evidence supporting termination of respondent-father's parental rights to MJB and MLBS, we fail to see how presenting evidence at the termination hearing would have changed the outcome below. *In re CR*, 250 Mich App at 198.

Finally, in respondents' consolidated brief on appeal, they argue, without providing any explanation, that they were "deprived of an opportunity to be meaningfully heard" below. Because respondents have failed to brief the merits of their due process argument on appeal, cite to the lower court record or supporting authority, they have abandoned their argument. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, because respondents failed to raise their due process argument in the statement of questions presented, the issue is not properly before this Court. *In re McEvoy*, 267 Mich App 55, 75 n 5; 704 NW2d 78 (2005).

We affirm.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kurtis T. Wilder